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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Inter-Carrier Compensation For ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
	)	
Implementation of the Local Competition Provisions In the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

REPLY COMMENTS OF ADELPHIA BUSINESS SOLUTIONS, INC.
ALLEGIANCE TELECOM, INC.
FOCAL COMMUNICATIONS CORPORATION,
AND RCN TELCOM SERVICES, INC.

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Adelphia Business Solutions, Inc. ("Adelphia"), Allegiance Telecom, Inc. ("Allegiance"), Focal Communications Corporation ("Focal") and RCN Telecom Services, Inc. ("RCN"), (collectively, the "Joint Commenters"), by their undersigned counsel, hereby submit their Reply Comments in response to the Public Notice issued on June 23, 2000.[1] The Commission has requested comment on the issues identified by the United States Court of Appeals for the District of Columbia Circuit in its decision vacating and remanding the Commission's *Reciprocal Compensation Ruling*.[2]

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[1] *Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit,* CC Docket Nos. 96-98, 99-68, Public Notice (rel. Jun. 23, 2000).

[2] *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), *vacating* Declaratory Ruling, *Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*").

INTRODUCTION AND SUMMARY

In their initial comments to the Commission from the D.C. Circuit's remand order, the ILECs continue their campaign of obfuscation and mis-information. For example, the ILECs rely on faulty authority to argue that the "end-to-end" analysis has been used for regulatory as well as jurisdictional purposes.[3] The ILECs continue to maintain, in a remarkable sleight-of-hand, that there is no difference between the jurisdiction of a communication and the way it is regulated[4], although in asserting this conclusion they ignore the very clearest example of such a distinction: the exemption from access charges granted to ISPs. Finally, ILECs stubbornly persist in asserting that calls to ISPs do not terminate at the ISP for reciprocal compensation purposes despite all of the evidence and state commission decisions to the contrary and despite the very clear indication from the D.C. Circuit that they do.[5]

These and other arguments of the incumbent LECs have been soundly rejected by the vast majority of state commissions and every United States court (district courts and circuit courts of appeal alike) to have considered them on the merits and this Commission should do the same. The Commission should state affirmatively and forcefully that the regulatory framework of treating jurisdictionally interstate calls to ISPs as local for all other regulatory purposes governs inter-carrier compensation for those calls as well. Local treatment of ISP-bound calls has served a vital national interest – promoting the development of, and access to, the Internet – since the ISP exemption was created nearly two decades ago. The policies behind that framework are as viable and vital now as they were in the early 1980's, if not more so. Indeed, it can be argued that

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3 SBC Comments at 10-13.

4 SBC Comments at 10-13; BellSouth Comments at 7.

5 *Bell Atlantic*, 206 F.3d at 6.

the payment of reciprocal compensation to CLECs – for calls to ISPs, among other new businesses – has fostered the development and spread of competition in the local exchange market.[6] Any structure which eliminates reciprocal compensation for calls to ISPs or which fails to compensate competing LECs for the services they provide and the costs they incur in transporting and terminating that traffic to their ISP customers could severely jeopardize both competitive ISPs and CLECs, to the ultimate detriment of the consuming public and to the ultimate relief of the ILECs both as providers of Internet services and as local exchange monopolists.

In sum, the Joint Commenters submit that the Commission can bring a halt to the long-simmering internecine warfare between ILECs and CLECs by concluding that calls to ISPs fall within the classes of traffic covered by sections 251(b)(5) and 252 of the 1996 Act and, as such, all of the Commission's rules pertaining to the payment of reciprocal compensation for that traffic apply. In terms of a forward-looking framework, the Commission should reiterate its expressed preference for the parties involved to resolve these issues through the negotiation and arbitration provisions of section 252, as supervised by the state regulatory commissions. Indeed, it is apparent from the precipitous drop in reciprocal compensation rates, and the growing number of settlements between carriers addressing both past amounts due and future compensation arrangements, that the market forces favored by the Commission are being

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[6] The incumbents cannot dispute that since the passage of the Act in 1996 the U. S. economy has generated thousands of new businesses, and many of these have been businesses that require highly sophisticated telecommunications and data services. *See, infra,* at 8 - 9. The presence of competing LECs, able to offer high quality telecommunications services at competitive rates, certainly facilitated the growth of many of these new businesses and, to some extent, the ability of competing carriers to offer these advanced services was due to the cash flow generated by terminating traffic to these new entities, some of which happened to be ISPs.

successful and there is no need at this time for the Commission to get involved in the process other than to affirm that its current reciprocal compensation rules apply to this traffic.

ARGUMENT

I. ILEC "POLICY" CONCERNS DO NOT WARRANT ANY CONCLUSION THAT DIAL-UP TRAFFIC IS NOT SUBJECT TO SECTION 251(B)(5)

A. Policy Concerns Do Not Determine Whether Dial-Up Traffic Is Subject to Reciprocal Compensation

In addition to repeating endlessly their mantra that dial-up calls to ISPs are jurisdictionally interstate, discussed below, ILECs raise a number of "policy" arguments as justification for finding that dial-up calls to ISPs are not subject to reciprocal compensation under Section 251(b)(5). These arguments relate to, for example, the one-way nature of ISP calls, CLEC costs, alleged CLEC scams, and skewed economic incentives. In case there is any doubt on this issue, Joint Commenters stress that these arguments have nothing to do with whether dial-up calls to ISPs terminate locally, and, therefore, also have nothing to do with whether this traffic is subject to reciprocal compensation under Section 251(b)(5). Rather, whether such traffic is subject to reciprocal compensation depends on whether it terminates locally, which, in turn, depends on operational factors and the historical treatment of this traffic that show that this traffic always has been treated as local for all other regulatory purposes. Accordingly, the Commission may not rely on any of these ILEC broader arguments in determining in the first instance whether dial-up calls to ISPs are subject to reciprocal compensation.

B. States Have Already Rejected ILEC Concerns

The woes that ILECs bring to the Commission's attention in the current round of pleadings have previously been brought to the attention of numerous state commissions. The allegations of market dysfunctions, harm to competition, threats to provision of advanced services, and wrong-doing on the part of CLECs have been paraded before many state commissions as justification for excusing ILECs from paying reciprocal compensation. This is particularly true with respect to the ILEC's cost and economic arguments concerning reciprocal compensation.[7] Accordingly, the Commission should consider carefully whether, and on what basis, it could embrace the same essential showings as justification for ending reciprocal compensation for dial-up calls to ISPs when many states have reached the opposite conclusion. Joint Commenters urge the Commission to give heavy weight to the previous determinations of state commissions and to reject ILEC complaints.

C. <u>ILECs May Address Their Concerns By Competing for ISP Customers</u>

As is evident, Section 251(b)(5) of the Act entitles all competing LECs to participate in provision of local services that entitles them to reciprocal compensation for transport and termination of traffic originating with the customers of other LECs. Although it is not directly relevant to the issues raised on remand, the Commission may want to note that ILECs can avoid or offset obligations to pay CLECs reciprocal compensation if they serve ISPs instead of CLECs and, moreover, ILECs are and always have been entitled to receive reciprocal compensation for calls to their ISP customers originating from CLEC customers. ILECs, however, have failed to take advantage of this equal opportunity to provide service to ISPs that could solve their reciprocal compensation woes. For whatever reason, they simply have chosen not to take this pro-competitive approach to solving their problems. Indeed, the current round of ILEC pleadings are remarkable in evincing attitudes and inflexibility that may explain why ILECs are poor competitors for ISP customers. For example, ILECs apparently are unwilling to offer

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[7] *See e.g.*, BellSouth Comments, attached Declaration of William E. Taylor.

innovative service options to ISPs such as permitting them to collocate in ILEC central offices. And, when CLECs offer this option, ILECs seem to think this is some sort of scam.[8] In reality, it merely reflects a willingness to provide the affordable service options that customers want. Accordingly, the Commission could, and should, address the tired package of ILEC policy concerns by simply directing ILECs to meet the challenge of the Act and be better competitors for ISP customers.

D. ILEC "Policy" Concerns Are No More than Concerns about Rate Level and Rate Structure That Should Be Raised in Negotiation and Arbitration Proceedings

All of the ILECs' policy concerns about economic incentives and the like are really no more than concerns about the current rate levels and rate structures for reciprocal compensation. To the extent the Commission gives any weight to these concerns, the Commission should conclude that at most they are relevant to rate level and rate structure issues that are properly the subject of negotiation and arbitration under Section 252 of the Act. The fact that these concerns could be, and are being, addressed in state proceedings[9] shows that there is no need for the Commission to reach the drastic, unwarranted, and erroneous conclusion that dial-up calls to ISPs are not subject to reciprocal compensation.

It is also worth noting that ILECs' high-minded rhetoric about economic incentives and the goals of the Act is really no more than after-the-fact dissatisfaction with the rate levels and rate structures that the *ILECs themselves insisted on and agreed to* in initial agreements with

[8] SBC Comments at 43.

[9] *See e.g., Proceeding On Motion of the Commission to Examine Reciprocal Compensation*, Opinion and Order Concerning Reciprocal Compensation, Case 99-C-0529, Opinion No. 99-10, (N.Y.P.S.C., released August 26, 1999).

CLECs. It was the ILECs who opposed bill and keep before the Commission in 1996[10] and who compelled CLECs in interconnection negotiations to accept high reciprocal compensation rates for exchange of local traffic. Thirty-three state commissions in arbitrations and enforcement actions have held that ILECs are required to pay reciprocal compensation for dial-up calls to ISPs. The fact that ILECs do not like what they bargained for is not a sufficient reason for the Commission to embrace the ILEC's sweeping negative characterizations of reciprocal compensation. Indeed, ILECs largely should be estopped from arguing against what they previously insisted upon. Instead, as discussed, the remedy to these ILEC concerns is negotiation and arbitration with CLECs over the rate level and rate structure for reciprocal compensation. The Commission does not need to address these "policy" issues at all in this proceeding other than to confirm that ILECs and CLECs may negotiate and arbitrate them pursuant to Section 252 of the Act.

E. The Telecommunications Marketplace Refutes ILEC Concerns

ILECs' policy concerns purport to show that reciprocal compensation for dial-up calls to ISPs undermines the goals of the Act. As discussed below, the specific concerns raised are unconvincing. Moreover, these concerns are more broadly refuted by the growth and success of the telecommunications marketplace since enactment of the 1996 Act. Taken at face value, ILECs' exaggerated concerns would lead to the conclusion that the telecommunications sky is falling: that there are significant economic distortions in the marketplace that threaten to undermine competition, the provision of advanced services, and even U.S. international relations.

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10 Bell Atlantic Reply Comments, filed May 30, 1996, p. 20 (bill and keep should be referred to as 'bilk and keep' because it would bilk ILEC customers by subsidizing the entry of CLECs); NYNEX Comments, filed May 16, 1996, p. 89 (contending that bill and keep is confiscatory except where traffic is balanced and carriers voluntarily waive their rights to mutual recovery of costs).

However, an undeniable feature of the contemporary U.S economy is the growth and success of the telecommunications marketplace.[11] The United States leads the world in growth in competition in telecommunications, and in roll-out of advanced services. ILECs have benefitted handsomely from the growth of the telecommunications sector and especially from growth in data traffic.[12] CLECs have played a key role in this success and in providing modern communications services and facilities to ISPs and other customers. Because reciprocal compensation has enabled CLECs to recover their costs of handling calls received from ILECs, it has played a vital role in their ability to serve ISPs which in turn has benefitted the economy as a whole.

In the face of this success and growth of the telecommunication sector, the ILEC's argument could only be that somehow, without reciprocal compensation, the telecommunications marketplace would have been even more successful or that somehow it has been harmed. However, ILECs have failed to make any such showing. There have been no identifiable harmful effects of reciprocal compensation.[13] As noted, ILECs are profiting from data growth. ILECs

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[11] "Bullish on Broadband," Dain Rauscher Wessels, June 8, 2000, Exhibit 1.1 (showing that U.S. telecommunications services revenues have increased from slightly over $200 billion to approximately $300 billion in 1999 and is projected to reach over $350 billion by 2001, with data communications growing by 30% per year).

[12] *See* Bell Atlantic 10-K, filed March 30, 2000, p. F-5 ("Data revenues (including those from high-bandwidth, packet-switched, and special access services and network integration businesses) reached over $2.9 billion for the year 1999, nearly 26% over 1998 levels. Data revenues in 1998 totaled $2.3 billion, an increase of 33% over 1997."); BellSouth 10-K, filed March 2, 2000, p 28 ("Local service revenues increases $854 million during 1999 and $1.016 billion during 1998, attributable to growth in switched access lines and strong demand for digital and data services and convenience features."); SBC 10-K, filed March 10, 2000, p. 96 ("Local service revenues increased $1.887 billion, or 10.9% in 1999, and $1.375 billion, or 8.7%, in 1998 due primarily to increases in demand, which totaled approximately $1.245 in 1999 and $1.270 in 1998, including increases in access lines, vertical services and data-related service revenues.").

[13] To be sure, there may have been isolated instances of alleged abuse by CLECs, but to the extent those may have occurred, they were the exception, certainly not the rule. Moreover, to the extent

are merely complaining bitterly and unreasonably about the fact that they must pay reciprocal compensation for dial-up calls to ISPs, the amount of which is tiny in comparison to the revenue gained from growth in second lines and increased minutes of use caused by increases in data traffic. Accordingly, the Commission should reject any view that reciprocal compensation is undermining the goals of the Act.

F. ILECs' Specific Policy Concerns Are Unconvincing

1. Reciprocal Compensation Does Not Reduce Competition for Residential Services.

Contrary to ILEC contentions, there is no basis for the Commission to conclude that reciprocal compensation reduces CLECs' willingness or ability to provide residential service.[14] Many CLECs are focusing on business customers because business customers are more concentrated than residential customers and are the first customers that CLECs can serve as their networks are being constructed. It is absurd to expect that CLECs could duplicate the ubiquity of the ILEC network overnight, especially since ILECs have sought to stall competition by any number of means including loop provisioning delays and unreasonable charges for collocation.[15] In any event, the ILECs ignore the fact that CLECs currently *are* providing residential service.

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that there may have been any abuses by CLECs, the Commission also should examine the extent to which the incumbents, themselves have abused the system.

[14] SBC Comments at 40; Verizon Comments at 11-14.

[15] Verizon has recently settled an antitrust suit by Covad by paying $2.7 million in damages for GTE's failure to provide cageless collocation as required by the Commission's rules. GTE to Pay $2.7 Million to Settle FCC Allegations, CNETNews.com, http://news/cnet.com/news/0-1004-200-2415845.html?tag=st.ne.1004.thed.ni, August 3, 2000.

In addition, Verizon's hypothetical comparative analysis of revenues is particularly unconvincing.[16] It purports to show that CLECs have no financial incentive to compete for a residential subscriber that has a second line to call ISPs because the CLEC would lose reciprocal compensation. However, this analysis is patently defective because it leaves out of the analysis the interstate access charges and highly profitable vertical features that ILECs earn on primary lines. Verizon conveniently ignores the self-evident fact that CLECs have strong incentives to capture a part of the multi-billion primary line residential market. For this reason, Verizon's analysis has absolutely no value in illuminating CLECs incentives to compete for residential subscribers. Accordingly, there is no basis for concluding that reciprocal compensation has had any adverse impact on provision by CLECs of service to residential customers.

2. Reciprocal Compensation Does Not Reduce Incentives of CLECs and ISPs to Deploy Advanced Services

Similarly, ILECs' arguments that reciprocal compensation is reducing incentives to provide advanced services are absurd. A number of CLECs are rolling out DSL services as fast as they possibly can.[17] So are ILECs, including SBC with its "Project Pronto" which will provide ADSL throughout its multi-state region. In general, "[t]he Commission's faithful implementation of the Act has resulted in an explosion of broadband deployment."[18] The Commission has recently reported that residential DSL service has increased 380% from 1998 to 1999 and

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16 Verizon Comments at 12-13.

17 "Bullish on Broadband," Dain Rauscher Wessels, June 8, 2000, Exhibit 5.5 (showing that CLEC DSL deployment for a number of providers has approximately quadrupled in one year).

18 Statement of William E. Kennard, Chairman, Federal Communications Commission, Before the Committee on Commerce United States Senate on "Broadband Internet Regulatory relief Act," July 26, 2000.

that most customers are residential and small business customers.[19] What is driving this rollout of advanced services by CLECs and ILECs is competition and consumer demand for higher speed access to the Internet. Given that DSL services are being introduced by ILECs and CLECs at a rapid pace there is no basis for concluding that reciprocal compensation for dial-up traffic is inhibiting the deployment of DSL or advanced services. ILECs also forget that it was CLECs that first commercially introduced DSL services and the competition from which caused ILECs to offer DSL services. Accordingly, it ill behooves ILECs to accuse CLECs of discouraging the deployment of DSL services.

3. Reciprocal Compensation Does Not Distort Pricing or Investment Decisions Or Cause Inefficient Entry.

ILEC allegations that reciprocal compensation is distorting investment and pricing decisions and causing inefficient entry are vague and unsupported.[20] These also appear to be no more than a concern about the rate level of reciprocal compensation. Thus, ILECs point to evidence purporting to show that reciprocal compensation is a "gravy train," or is causing CLECs to engage in alleged scams.[21] However, to the extent rate level is a concern, the remedy is to adjust the rate level. ILECs have provided no information that appropriately priced reciprocal compensation for transport and termination of dial-up calls to ISPs (whether the current rate or some other rate) based on ILEC costs would create any economic distortions. As stated elsewhere in these comments, ILECs should raise their concerns about the rate level and rate

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19 *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services*, News Release, released August 3, 2000.

20 SBC Comments at 42-46; Verizon Comments at 11.

21 SBC Comments at 43; Verizon Comments at 17.

structure of reciprocal compensation in negotiations and arbitrations. These concerns are not relevant to whether reciprocal compensation should apply to this traffic.

4. "Virtual NXXs"

ILECs also complain about the so-called virtual NXX problem.[22] However, this assignment and use of NXX codes for dial-up calls to ISPs is consistent with CLECs interconnection agreements and is the same as for other traffic. ILECs do not object to this assignment and use of NXXs for voice calls. Moreover, CLECs' use of NXXs is no more than a variation of ILECs' own service offerings such as Bell Atlantic's Wide Area FlexPath service,[23] or FX services.[24] In sum, ILECs' concern on this issue is merely another variation of the ILECs' general theme that they should not be held to what they agreed to in interconnection agreements. Once again, ILECs should seek to address this in negotiations and arbitrations.

5. International Issues Are Not Affected By Reciprocal Compensation

The extent of the ILECs desperation to justify their position is illustrated by SBC's contention that continuation of reciprocal compensation for dial-up calls to ISPs will undermine U.S. positions in international fora that are addressing international charging arrangements for Internet services ("ICAIS").[25] However, the issue before the ITU concerns peering arrangements

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22 SBC Comments at 43; BellSouth Comments at 13.

23 FlexPath combines the functionality of Direct Inward Dialing, Direct Outward Dialing, and toll-free trunks into one service. http://www.bell-atlantic.net/largebiz/flexpath.htm, August 3, 2000.

24 Verizon Comments at 18; BellSouth Comments at 13; Investigation into the Use of Central Office Codes (NXXs) by New England Fiber Communications LLC d/b/a Brooks Fiber, Order Requiring Reclamation of NXX Codes and Special ISP Rates by ILECs, Docket No. 98-758, Order No. 4 (Me. P.U.C. June 30, 2000). It is worth noting that the Maine proceeding cited by ILECs involved a CLEC that was offering service outside of its certificated service area.

25 SBC Comments at 47.

between ISPs and does not relate to intercarrier compensation at all. A determination by the Commission in this proceeding that dial-up calls to ISPs are subject to reciprocal compensation would not in any way undercut U.S. positions on ICAIS before the ITU.

II. THE COMMISSION'S END-TO-END ANALYSIS DETERMINES ONLY THE JURISDICTION OF A COMMUNICATION; IT DOES NOT DETERMINE HOW THAT COMMUNICATION WILL, OR SHOULD BE, REGULATED.

In its Initial Comments, SBC frames the ultimate legal question before the Commission as "whether a CLEC that delivers Internet traffic to an ISP is 'terminating' 'local telecommunications traffic.'"[26] Based on faulty logic and ill-chosen authority, SBC reaches entirely the wrong answer. SBC claims that long-standing legal precedent supports the argument that the Commission's "end-to-end" analysis has been applied to determine the regulatory status of a communication, as well as its jurisdiction.[27] In support of this erroneous position, SBC relies upon a series of cases which are technologically, factually and legally distinguishable from the situation presented by the traffic at issue here. Moreover, even if the cases cited by SBC might represent instances where the Commission has applied the "end-to-end" jurisdictional test to determine other regulatory treatment, the D.C. Circuit already has rejected the view that jurisdiction, alone, determines whether calls to ISPs are eligible for reciprocal compensation. Reliance on these cases to reach the same result merely would repeat the error of the *Reciprocal Compensation Ruling*.

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[26] SBC Comments at 3.

For example, SBC relies heavily on *Teleconnect v. Bell Telephone Co. of Pa.*[28], *International Telecharge, Inc. v. Southwestern Bell*[29], *Bill Correctors, Inc. v. Pacific Bell*[30] and *AT&T Corp. v. Bell Atlantic–Pennsylvania*[31] for the proposition that the end-to-end jurisdictional analysis of the traffic at issue in those cases determined the regulatory treatment as well. SBC's reliance on these and other cited cases is misplaced for several reasons.

First, there is no dispute that the traffic at issue in those cases was telecommunications, from beginning to end. There was no assertion in any of those cases that, like here, there are two separate components of a single communication – telecommunications *and* information services.

Second, there also was no dispute as to the jurisdiction of any portion of the communications at issue in those cases: the traffic was interstate, from beginning to end, without regard for any intermediate switching that might have taken place. In this case, however, there clearly is an issue as to whether the portion of the communication that runs between the originating end-user and the terminating ISP should be viewed as local for reciprocal compensation purposes even if the totality of the communication from end-user to website might be interstate.

Third, all of the cases involved interexchange carriers which, as the Commission has said repeatedly, do not make use of the public switched network in the same way as ISPs. Moreover, these cases involved the interpretation of ILECs' interstate tariffs and relied on jurisdictional issues to determine the proper assessment of charges under those tariffs. This provides no

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28 10 FCC Rcd 1626 (1995), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, No. 95-1193 (D.C. Cir. 1997)

29 11 FCC Rcd 10061 (1996).

30 10 FCC Rcd 2305 (1995).

31 14 FCC Rcd 556 (1998).

guidance to the application of section 251(b)(5) of the 1996 Act. The cited cases simply do not stand for the proposition that the Commission can, or must, equate jurisdiction with eligibility for reciprocal compensation.[32] Indeed, under the D.C. Circuit decision, it may not do so.

At bottom, SBC relies on this line of cases to support the proposition that the Commission's "end-to-end" jurisdictional analysis must be coextensive with its regulatory authority, otherwise, "the Commission's jurisdiction over a communication would not be coincident with its authority to establish a rate regime for that communication under section 201."[33] The fundamental flaw in SBC's argument is that it already has been rejected in circumstances that are fatal to the argument here. Principally, the United States Supreme Court has held that the 1996 Act expanded the authority of the Commission into areas that, previously, had been within the sole province of the states and, to that extent, blurred any distinctions that might have existed between purely interstate and intrastate communications.[34]

Similarly, in affirming the Commission's decision in the *Access Charge Reform Order*[35] to maintain the access charge exemption granted to ISPs, the United States Court of Appeals for

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32 SBC suggests that in the *Teleconnect* case the Commission dismissed arguments by Nevada Bell and Pacific Bell that there is a distinction between the jurisdiction of a call and its regulatory treatment because it was a distinction without a difference. (SBC Comments at 11). This is an inaccurate reading of that case. To be sure, it is entirely possible that those carriers failed to present persuasive authority in support of their argument, but that plainly is not the case here. First, the D.C. Circuit plainly recognizes a difference between the jurisdiction of a call and its regulatory treatment and, second, the framework under which ISPs use local facilities to provide interstate communications, yet purchase connections to the public network from local tariffs and are under the supervision of state regulatory commissions highlights the validity of the distinction in this context.

33 SBC Comments at 13.

34 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721 (1999). Similarly, through sections 251 and 252, the 1996 Act expanded state commission authority to interstate services.

35 *In re Access Charge Reform*, First Report and Order (CC Docket Nos. 96-242, 94-1, 91-213, 95-72)(May 17, 1997)("*Access Charge Reform Order*"), ¶¶ 344-348.

the Eighth Circuit rejected arguments from incumbents that the Commission's action "amounts to a dereliction of [its] obligation to retain exclusive jurisdiction over interstate communications and forces state regulatory commissions to overstep their authority by recovering interstate costs."[36] In a somewhat prescient decision foreshadowing the conclusions of the D.C. Circuit in this case, the Eighth Circuit considered and dismissed the very same arguments concerning the nature of ISP traffic the incumbents stubbornly reiterate here and concluded, ultimately, that since ISPs do not use LEC facilities the same way interexchange carriers do, and since calls to ISPs involve intrastate as well as interstate components, it was proper for the Commission to allow the states to regulate certain aspects of the ISP-bound communication. The Eighth Circuit stated its view as follows:

> Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate . . . the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC . . . , but not to pay the per-minute interstate access charge. The states are free to assess intrastate tariffs as they see fit. In these circumstances, we cannot say that the FCC has shirked its responsibility to regulate interstate telecommunications, nor can we conclude that it has directed the States to inflate intrastate tariffs to cover otherwise unrecoverable interstate costs, thereby exceeding its statutory authority.[37]

In light of these two salient decisions, the Joint Commenters are hard-pressed to understand how, in the context of reciprocal compensation for calls to ISPs, the ILECs can argue that the Commission would lose any authority if it were to determine that the portion of the

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36 *Southwestern Bell Telephone Co. v. Federal Communications Commission*, 153 F.3d 523, 542-43 (8th Cir., 1998).

37 153 F.3d at 543. Notably, none of the incumbents appealed the Eighth Circuit's determination; arguably then, they are estopped from raising the same argument here.

communication that represents telecommunications from the end-user to the ISP should be treated as local for reciprocal compensation purposes.

This inexplicable fear of "bifurcated jurisdiction"[38] which permeates SBC's comments is meritless, precisely because it has been in place since the early 1980's, when the Commission first determined that ISPs were not subject to the access charge regime and directed, instead that ISPs should purchase their connections to the public network from state-imposed intrastate tariffs. From the outset, the Commission recognized its authority over ISP-bound traffic due to the predominantly interstate nature of that traffic while, at the same time, determining to regulate that traffic as local traffic. That action did not give the states "veto power over federal communications policies"[39] then and extending that authority to cover the compensation arrangements between carriers for the exchange of calls to ISPs would not do so now.

The bottom line is that jurisdiction alone simply does not determine how any particular communication will be treated from a regulatory perspective. In this case, it is entirely proper for the Commission to conclude that calls to ISPs, while jurisdictionally interstate, fall within the classes of traffic covered by sections 251 and 252 of the 1996 Act. It follows that the full panoply of rules and regulations addressing reciprocal compensation for classes of traffic subject to sections 251 and 252 apply with equal force to dial-up calls to ISPs.

III. FOR THE PURPOSES OF RECIPROCAL COMPENSATION, CALLS TO ISPS ARE PROPERLY VIEWED AS TERMINATING AT THE ISP.

In another argument made and rejected countless times before, the ILECs contend that calls to ISPs do not terminate at the ISP and, therefore, they argue, cannot possibly be eligible for

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[38] SBC Comments at 14.

[39] *Id.*

reciprocal compensation.[40] Here, too, the ILECs predicate their flawed view on the erroneous notion that "termination" for the purposes of jurisdiction is the same as "termination" for the purposes of regulatory treatment. In taking this position, though, the ILECs discount entirely the view of the D.C. Circuit Court that termination can have different meanings in different contexts; they rely on inapposite cases; and, they ignore the repeated instances in which the concept of "termination" has been used precisely as the CLECs use it here.

In addition to their blind adherence to the "jurisdiction equals regulation" argument, which the Joint Commenters disposed of above, the ILECs also argue that the ISPs' status as an information provider has no impact on the termination analysis and that, in any event, the Commission's definition of termination does not apply because the ISPs are not the called party. None of these arguments has merit.

It is patently absurd to suggest that the ISP's status as an information service provider has no impact whatever on the determination as to whether calls are considered to terminate there for purposes of reciprocal compensation. In fact, it is the fundamental distinction between a typical interexchange, interstate communication and a communication involving the Internet which makes it abundantly clear that the ISP's role as an information service provider is critical and, further, that calls to ISPs terminate there for these purposes.

In the first place, it is entirely correct to say that the typical, interexchange call from the originating end-user to the terminating end-user is a single, continuous communication that begins and ends as a telecommunications service and retains that essential character without change throughout the course of the call. In the world of the Internet, however, nothing could be

[40] Interestingly, in all of their verbiage, the ILECs never quite deal with one simple fact: under long-standing Commission rules, calls to ISPs have been viewed as terminating at the ISP for all purposes *except* reciprocal compensation.

further from the truth. The Commission, and the incumbents, need no lecture on how, in the Internet context, the information from the end-user is recast and grouped into packets before being sent out onto the Internet for ultimate delivery to a website; nor do they need reminding that the individual packets that get delivered often travel very different paths to and from their destination.[41]

This essential difference between telecommunications and information services is nothing new; the Commission long has recognized the distinction. For example, in the *Universal Service Order*[42] the Commission determined that Internet access consists of severable components:

> When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, *that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering.*[43]

The Commission also has recognized that this distinction between telecommunications and information services is crucial. Thus, the Commission noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of

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[41] *Order Instituting Rulemaking on the Commission's Own Motion into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Services Providers Modems* (Rulemaking No. 00-02-005) (Cal. P.U.C.), Testimony of Fred Goldstein at 13 (filed July 14, 2000).

[42] *In the Matter of Federal-State Joint Board on Universal Service,* Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("*1997 Universal Service Order*").

[43] *Id.*, ¶ 789 (emphasis added). *See also, id.*, ¶ 83:

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.

(Citation omitted).

services" *despite the appearance from the end user's perspective* that it is a single service because it may involve telecommunications components.[44] In fact, the Commission noted that Congress intended the categories of 'telecommunications" and "information service" to be "*mutually exclusive.*"[45]

As the Commission explained, the distinction between telecommunications and information services is functional, and does not depend on who provides the service or by what method:

> A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, *if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.*[46]

The Commission applied these principles to Internet services in the *1998 Universal Service Report* and reached a carefully drawn conclusion that the Internet access services that ISPs provide are information services, not telecommunications services – and this remains true even though they provide information services "via telecommunications." The Commission stated its view as follows:

> We find that Internet access services are appropriately classified as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path; they

[44] *1998 Universal Service Report* ¶ 57; *see also, id.* ¶ 58.

[45] *Id.* ¶ 59 (emphasis added).

[46] *Id.* (emphasis added).

combine computer processing, information provision, and other computer mediated offerings with data transport.[47]

Given these critical distinctions, the ILECs stubbornly maintain that the call to the ISP does not terminate there and, in support of this proposition, rely on the Commission's *MemoryCall* Order[48], which SBC touts as "dispositive." Apparently, SBC believes that the *MemoryCall* case stands for the proposition that "the Commission squarely rejected the argument that telecommunications terminates at the point an information service begins."[49] On examination, it is clear that the *MemoryCall* decision not only is not dispositive, it provides no guidance here at all. The issue there dealt with whether the intrastate portion of an interexchange call, from the switch to caller's voice mail box, was a separate local call such that the Georgia Commission could assert jurisdiction over the "local portion" as well as the voice mail service or whether the entire transmission was interstate, and, therefore, under the Commission's jurisdiction. Not surprisingly, the Commission concluded that the entire transmission was interstate because, in fact, it was. The communication at issue began out of state, it was switched within the state and was terminated at BellSouth's voice mail service. The communication was interexchange telecommunications from the moment it left the originating end user until the moment it reached the voice mail server. Thus, *MemoryCall* only addresses the application of the end-to-end analysis to determine the Commission's jurisdiction, which the Joint Commenters do not dispute. Critically, *MemoryCall* does not stand for the proposition that telecommunications, as such, may not terminate for regulatory purposes at the ISP. In fact, the Commission did not even

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47 *Id.* ¶ 73.

48 *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992)("*MemoryCall*").

49 SBC Comments at 18.

address the numerous decisions indicating that the telecommunications portion of an information service loses its separate character, subject to separate regulation as telecommunications, once it has been combined with, or used by, the information service.[50] Therefore, *MemoryCall* is not dispositive of any issue before the Commission on remand and readily can be ignored.

The ILECs' final argument is that the Commission's definition of termination in 47 C.F.R., section 51.701(d) is not applicable because, in their view, the definition does not mean what it says and, second, because the ISP is not the called party.[51] Not only does this view reject entirely the conclusion of the D.C. Circuit[52], it has no support in law or logic. SBC admits that only "local telecommunications traffic" is eligible for reciprocal compensation[53], and it admits that local telecommunications traffic is defined as "telecommunications traffic . . . that originates and terminates within a local service area . . . ."[54] Thus, calls to ISPs are eligible for reciprocal compensation if they originate and terminate within a local service area. Under the Commission's definition of termination, as viewed by the D.C. Circuit, it does.

The Commission defines "termination" as:

> the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.[55]

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50 *Universal Service Report, supra; Third Computer Inquiry, Phase* II, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150, n. 23 (1988).

51 SBC Comments at 20-22; Verizon Comments at 6.

52 *Bell Atlantic, supra*, 206 F.3d at 6.

53 SBC Comments at 3.

54 *Id.*

55 47 C.F.R. §51.701(d); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order ¶ 1040 (1996).

The Joint Commenters interpret this definition as clearly as the D.C. Circuit does: "the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'"[56] The ILECs' complain that the rule does not define which calls are subject to reciprocal compensation.[57] This states the obvious, but it also misses the point. The purpose of the rule is to define the concept of termination, not for jurisdictional purposes, but only for the limited purpose of determining whether a particular call fits within the classes of traffic covered by section 251(b)(5). If it does, then it is eligible for reciprocal compensation. That is the extent of the rule; it has nothing whatever to do with the jurisdiction of the call, although SBC does not seem to grasp that elementary notion.[58]

The even more ludicrous argument is that the ISP is not the called party; instead, SBC argues, it is the website.[59] Practically speaking, as well as legally, it is logical to view the ISP as the called party. In part, because of the way consumers reach the Internet, in general, or particular websites. As even the incumbents will agree, the end-user consumer directs her modem to dial a seven or ten digit local number assigned to her chosen ISP. The call is answered by the ISP's modem, answer supervision is returned and the consumer is connected to her ISP where she is free to begin an Internet session.

Throughout that entire Internet communication, whether it involves none, one or a myriad of Internet websites, there is only one point of "termination" that can be identified clearly and

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56 *Bell Atlantic, supra*, 206 F.3d at 6.

57 SBC Comments at 20.

58 *Id.* at 21 ("To read this definition — as does WorldCom — as discarding fifty-plus years of precedent regarding the boundaries of a communication — is to extend that rule beyond its intended purpose.")

59 *Id.* at 22.

consistently: the ISP's modem that answered the call to the local number that was dialed by the end-user's modem. Everything else is in the Internet cloud – and is not susceptible of ready identification.[60] Indeed, although SBC claims that the website is the called party, it offers no easy way to identify where the website is located. The telephone numbers assigned to the ISPs have NPAs and NXXs typically associated with geographic area that is local to the originating caller. This simply is not the case with URL addresses of websites, which give no indication of geographic location whatever.

Similarly, while a typical interexchange call represents a continuous, two-way exchange between end-users, the only continuous, two-way exchange in the Internet context is between the end-user and the ISP. The incumbents do not dispute that in a single Internet session, callers may visit a variety of sites, some interstate, some intrastate, some potentially international. Throughout this entire communication, the connection with any one website is temporal, but the connection between the end-user and the ISP is consistent. Under these facts, to suggest that the ISP is not the called party, or that the Commission's definition of "termination" does not result in the conclusion that the call to the ISP terminates there is sheer folly.

IV. THE "EXCHANGE ACCESS" v. "TELEPHONE EXCHANGE SERVICE" DEBATE ALREADY HAS BEEN ANSWERED BY THE COMMISSION

In their Initial Comments, the Joint Commenters observed that it did not matter whether calls to ISPs were characterized as "exchange access" or "telephone exchange service" for purposes of determining whether that traffic was eligible for reciprocal compensation.[61] SBC and

60 *Order Instituting Rulemaking on the Commission's Own Motion into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Services Providers Modems* (Rulemaking No. 00-02-005) (Cal. P.U.C.), Testimony of Fred Goldstein at 13 - 19 (filed July 14, 2000).

61 Joint Commenters Initial Comments at 15.

BellSouth agree with that assessment,[62] but then go on to contend that calls to ISPs are exchange access.[63] This debate, while perhaps academically intriguing, does nothing to answer the question posed by the D.C. Circuit. Recognizing that calls to ISPs are "not quite local" and "not quite long-distance", the proper focus of the inquiry, as the D.C. Circuit framed it, is "whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.[64]

This question was answered by the Commission nearly twenty years ago when it first determined that calls to enhanced service providers, of which ISPs admittedly are a subset, would not be subject to the Commission's access charge regime. Concluding in 1983 that enhanced service providers utilize "local exchange services or facilities . . ., in part or in whole, for the purpose of completing interstate calls"[65], the Commission decided that, for regulatory purposes, calls to enhanced service providers would be placed into "the local call model of two collaborating LECs." In numerous orders and decisions released since then, the Commission has rebuffed many efforts to eliminate the access charge exemption or to remove calls to ESPs/ISPs from that local call model. Thus, since at least 1983 the Commission steadfastly has viewed calls to ISPs as fitting the local call model and an application of that principle here leads to the conclusion that calls to ISPs are eligible for reciprocal compensation.

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62 SBC Comments at 22-23; BellSouth Comments at 8.

63 SBC Comments at 23. *See also*, Verizon Comments at 9; BellSouth Comments at 8.

64 *Bell Atlantic*, *supra*, 206 F.3d at 5.

65 *In the matter of MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, 97 F.C.C.2d 682, 715 (1983).

Joint Commenters also point out that the Commission may not rely on the *Advanced Services Remand Order*[66] to conclude that ILEC services purchased by ISPs to receive dial-up calls are exchange access service. As pointed out by other commenters,[67] the Commission in the *Advanced Services Remand Order* mischaracterized the *Non-Accounting Safeguards Order.*[68] The Commission in the *Advanced Services Remand Order* characterized the *Non-Accounting Safeguards Order* as finding that ISPs do not use exchange access service because they were not able to purchase such services because they are non-carriers. This finding does not appear in the *Non-Accounting Safeguards Order*. In fact, in the *Non-Accounting Safeguards Order* the Commission found that "ISPs do not use exchange access *as defined by the Act*."[69]

Further, the D.C. Circuit in *Bell Atlantic* employed the same statutory analysis as the Commission in the *Non-Accounting Safeguards Order* in determining that "ISPs do not use exchange access as defined by the Act." Thus, the Court found that the Commission had not considered how ISPs could be considered to use exchange access since exchange access is offered "for the provision of the origination or termination of telephone toll services"[70] and ISPs as non-carriers do not offer telephone toll service.[71] Thus, it appears that the Commission's

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66 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications* Services, 15 FCC Rcd 385(1999)("*Advanced Services Remand Order*").

67 WorldCom, p 11-12.

68 *Advanced Services Remand Order*, paras 42-3; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996)("*Non-Accounting Safeguards Order*").

69 *Non-Accounting Safeguards Order*, para 248.

70 47 U.S.C. Section 153(16).

71 *Bell Atlantic*, 206 F.3d 1, 8.

determination in the *Advanced Services Remand Order* that the *Non-Accounting Safeguards Order* needed to be corrected was itself erroneous and may not be relied on for any determination that ISPs use exchange access as defined in the Act.

In addition, the *Advanced Services Order* applies only to dedicated service such as DSL service. Thus, the Commission stated that its determinations therein would have no application to reciprocal compensation issues for dial-up calls to ISPs. Accordingly, for all these reasons, the *Advanced Services Order* provides no guidance to the Commission in this proceeding and in light of *Bell Atlantic* is itself highly suspect. The Commission should request a voluntary remand of the *Advanced Services Order* to correct inconsistencies.

Further, dial-up services purchased by ISPs do not constitute exchange access to the extent they bear any resemblance to Feature Group A interstate exchange access service. As a practical matter, because of the ESP exemption, ISPs do not purchase Feature Group A service. They purchase out of local exchange tariffs. Therefore, there is no basis for legally characterizing the services they receive as interstate access service since that is not what they purchase. Moreover, the services are not operationally the same in that the circuit switched call terminates locally in the case of dial-up services purchased by ISPs whereas with Feature Group A the circuit switched portion of the call continues to its ultimate destination which may be an interstate location. The dial-up service involves circuit termination and other call breakdown function which do no occur in connection with circuit switched interstate access services. Accordingly, the Commission should reject ILEC arguments concerning Feature Group A.

V. "BILL AND KEEP" SHOULD NOT BE ESTABLISHED

A. Bill and Keep May Not Be Imposed When Traffic Is Unbalanced

In the *Local Competition Order*, the Commission established the circumstances under which bill and keep would be an acceptable method of reciprocal compensation. The Commission provided that states may impose bill and keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the other direction.[72] The Commission found that bill and keep in other circumstances would not compensate carriers for costs incurred and that imposing bill and keep when terminating traffic is out-of-balance would be economically inefficient.[73] As observed by ILECs, dial-up traffic to ISPs is frequently not in balance. As determined by the Commission, bill and keep would therefore impose uncompensated costs on CLECs and be economically inefficient. It would be arbitrary for the Commission to conclude now, as ILECs request, that bill and keep should be imposed because traffic is out of balance when it was precisely in that circumstance that the Commission determined that bill and keep could not be imposed. Accordingly, the Commission may not establish bill and keep for this traffic.

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[72] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, para 1111 (1996) ("*Local Competition Order*"), *vacated in part, aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998); *vacated in part sub nom, Iowa Utils Bd.v. FCC*, No. 96-3321 (8th Cir. July 18, 2000).

[73] *Id.* para. 1112.

B. CLECs Do Not Necessarily Have Lower Costs

Moreover, ILECs have not shown that CLECs have lower costs than ILECs. Many CLECs, continue only to use circuit switches to terminate both voice and data traffic. There is no showing in the record that CLECs in general do not incur the same circuit switching costs as ILECs in handling dial-up data traffic. In fact, some ILECs claim that CLECs are not taking advantage of new technologies.[74] In addition, to the extent that it is more efficient for some carriers to employ equipment that separately handles data traffic, the Commission should assume that ILECs will deploy it. It is no accident that ILECs are silent in this record on their own plans to employ the types of data equipment that they claim shows that CLECs are experiencing lower costs in handling dial-up data traffic.[75] If this equipment is more efficient, it would be irresponsible for ILECs to not also employ it, especially since under price cap regulation ILECs are permitted to boost earnings to very high levels by cutting costs.

On the whole, there is no reason to believe that currently, and in the long run, CLECs do not, and will not, have networks that share the same cost characteristics as ILECs in handling dial-up data calls. Therefore, there is no basis to assume that bill and keep would be appropriate because of ILEC/CLEC asymmetrical costs (assuming also that traffic was balanced, which it is not.) Joint Commenters stress that they incur significant costs in terminating calls received from ILEC customers and that it is essential that they receive compensation for handling these calls. At the same time, ILECs also avoid costs when CLECs provide transport and termination for calls originating on ILEC networks.

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[74] Verizon, p. 15.

[75] "Commercial VoDSL Near Reality," Internet News, http://www.internetnews.com/isp-news/article/0,2171,8_427351,00.html, August 1, 2000 (reporting that Verizon Communications will employ the Lucent Stinger to provide voice over DSL service)

In reality, ILEC arguments in favor of bill and keep are the same arguments that they raise as to why dial-up calls to ISPs should not be subject to reciprocal compensation under Section 251(b)(5). As discussed, all of these arguments reflect no more than ILEC concerns about current rate levels and rate structures for reciprocal compensation. For the same reasons that they do not warrant a conclusion that dial-up calls to ISPs are not subject to reciprocal compensation under Section 252(b)(5), they also do not support a conclusion to impose bill and keep.

As noted previously, ILEC arguments in favor of bill and keep are a remarkable transformation in position from when they initially addressed this issue before the Commission and from their initial interconnection agreements.[76] There, ILECs insisted on high reciprocal compensation and emphatically rejected bill and keep. ILECs assumed that CLECs would be terminating most of the traffic to them. The fact that it has not turned out that way, is not a sufficient reason for the Commission to embrace ILECs' current love affair with bill and keep and impose uncompensated costs on CLECs.

VI. STATE COMMENTS SUPPORT RECIPROCAL COMPENSATION FOR DIAL-UP CALLS TO ISPs

As already observed, thirty-three state commissions have determined that dial-up calls to ISPs are, and should be, subject to reciprocal compensation. Initial comments from states also support this conclusion. Joint Commenters fully endorse the California, Florida, and New York view that calls to ISPs are subject to reciprocal compensation.

The Massachusetts and Missouri comments do not warrant a contrary conclusion. Massachusetts urges the Commission to end regulatory uncertainty concerning reciprocal com-

[76] *See* n. 10, *supra*.

pensation for dial-up calls to ISPs even to the point of preempting state authority, if necessary. [77] Massachusetts concludes that it has been burdensome for state commissions to resolve reciprocal compensation in light of the uncertain foundation of state authority over reciprocal compensation issues created by the *Dial-Up Order*.[78] Missouri urges the Commission to assert jurisdiction and resolve reciprocal compensation issues without delay.[79]

Joint Commenters agree that the *Dial-Up Order* created regulatory uncertainty by making the erroneous determination that jurisdiction determines termination for purposes of reciprocal compensation under Section 251(b)(5). For all the reasons stated in these comments, the Commission should promptly determine that dial-up calls to ISPs are subject to reciprocal compensation under Section 251(b)(5). This would bring this issue squarely within the authority of state commissions under Sections 251 and 252 subject to guidelines established by the Commission and end the awkward situation created by the declarations in the *Dial-Up Order* to the effect that the Commission had no rules governing reciprocal compensation for dial-up calls to ISPs, that intercarrier compensation for this traffic is outside the scope of Section 251(b)(5), and that states should resolve reciprocal compensation issues for this traffic without any guidance from the Commission. Accordingly, a determination that dial-up calls to ISPs are subject to reciprocal compensation would address concerns of the Massachusetts and Missouri commissions. This determination would also properly preclude any preemption of state authority over reciprocal compensation issues except pursuant to the standards set forth in Section 252(e)(5) of the Act.

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[77] Massachusetts DTE, p. 2.

[78] *Id.* p.2-3.

[79] Missouri PSC, p. 1.

Joint Commenters also support the Texas PUC comments urging the Commission to determine that dial-up calls to ISPs are subject to reciprocal compensation. However, the Commission should not rescind or modify the geographic comparability rule.[80] Under that rule, CLECs may charge the ILEC tandem rate when the CLEC's switch serves an area comparable to the ILEC tandem switch. As discussed below, the Commission should continue current reciprocal compensation rules in effect in all respects. The request of the Texas PUC to eliminate the geographic comparability rule, which would apply to all traffic, not just ISP traffic, is beyond the scope of this proceeding. Further, the *Local Competition Order* recognized that CLECs may employ new and different technologies than ILECs and specifically found that use of new technologies would not preclude CLECs' entitlement to reciprocal compensation at the tandem rate level as long as the area served is comparable to the ILEC tandem service area.[81] The Commission should continue that rule in effect in order to assure that CLEC are not financially penalized for using new technologies. Accordingly, the Commission should reject the Texas PUC's request on this issue.

VII. CURRENT COMMISSION RULES SHOULD CONTINUE

A. Current Rules Apply, and Have Applied Since 1996, to Dial-Up Calls to ISPs

In the *Dial-Up Order*, the Commission erroneously determined that jurisdiction determined termination for purposes of reciprocal compensation under Section 251(b)(5). The Commission further determined that dial-up calls to ISPs were not subject to that section, and that the Commission had no rules governing intercarrier-compensation for such calls. The Commission initiated the present rulemaking to establish such rules. As discussed, the

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80 47 C.F.R. Section 51.711(a)(3).

81 *Local Competition Order*, para. 1090.

Commission should determine that dial-up calls to ISPs are subject to reciprocal compensation even if they are jurisdictionally interstate. As a result, there is no question that the Commission's reciprocal compensation rules have applied since they were adopted in 1996.

In addition, if for any reason the Commission erroneously concludes that dial-up calls to ISPs are not subject to reciprocal compensation under Section 251(b)(5), the Commission should provide that the current policy of permitting states to govern reciprocal compensation for this traffic will continue, and that current state decisions will continue in effect, until new federal rules are established that will govern intercarrier compensation going-forward.

B. Current Rules Should Continue Going-Forward

Current rules provide an appropriate basis for governing reciprocal compensation for dial-up calls to ISPs going forward. These rules establish broad guidelines that states can use to set reciprocal compensate rates either in arbitrations or generic proceedings. These rules provide a framework for setting rates that will assure that CLECs obtain compensation for the costs that CLECs incur in terminating calls received from ILEC customers. And, for all the reasons stated in the *Local Competition Order* when the Commission adopted them in 1996, the more specific rate structure guidelines remain valid today.[82] In particular, it is appropriate to continue to use ILEC costs as the basis for setting reciprocal compensation rates because, in addition to the reasons stated in the *Local Competition Order*, there is no reason to believe based on the current record that currently or in the long run ILECs will have significantly different costs or cost structures of handling data traffic.[83]

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[82] *Local Competition Order*, paras 1085-1093.

[83] *Local Competition Order*, para 1088.

Nor is there any reason to provide that states may establish data traffic as a separate category of traffic for reciprocal compensation purposes with different rates. SBC, has submitted a cost study purporting to show that the costs of handling data traffic are significantly lower. However, the Texas PUC has already rejected this study because it did not provide any probative evidence on this issue. The Texas PUC found that SBC had made inappropriate cost comparisons and had admitted that ISP-bound traffic uses the same switches and the same network as voice traffic.[84]

Accordingly, the Commission should maintain current reciprocal compensation rules in effect to govern dial-up calls to ISPs without modification.

CONCLUSION

For the foregoing reasons, the Commission should rule that the reciprocal compensation obligations of Section 251(b)(5) applies to local traffic and traffic treated as local traffic for

[84] SBC Comments at 35-36; *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996,* Docket No. 21982, at 43-44 (Tex. P.U.C. July 13, 2000).

regulatory purposes, including ISP-bound traffic. Further, local telecommunications to ISPs terminate at the ISP because LECs provide the final switching before delivery to the ISP, a business end user, and answer supervision is returned, the industry's accepted indicia of call termination.

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